BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE, NO. 00-319
_____/

Supreme Court No.: SC-002510

RESPONDENT'S MOTION TO DISMISS

I. Introduction

1. There is a single, simple premise to these formal charges. It is that Canon 3(B)7 prohibits a judge from discussing a pending case with anyone except the attorneys in court, fellow judges or law clerks. This imposes the same isolation on a judge that is imposed on jurors while they hear a case, but of course, judges are not jurors. Judges do not perform the same function as jurors. No court has ever held or said judges should be confined by the same restraints as jurors. Even jurors are released from their restraints after a trial, but the premises of these charges are that Judge Baker can have no communications outside of the courts regarding his case before, during or after the trial. Judges think the same way as everybody else. It is extremely unlikely there is a judge who has not discussed cases with a spouse, relatives, close friends and confidants who have no knowledge or stake or interest in the cases being discussed. That is what Judge Baker did. He candidly and forthrightly said he did so in the case at issue because he had thoroughly researched and heard argument on the latitude he was permitted. He believed he could and should properly explore technical matters with close family members and close friends who could help him think through the legal issues.

2. The Investigative Panel's premise is completely unprecedented. No court has ever held that judges are prevented from trying out their own ideas and exploring different

ideas with persons who are complete strangers to the litigation and have no interest in influencing the judge toward one side or the other. The only institutions who require such rigorous avoidance of normal and natural human interaction are a few ascetic religious orders whose members seek other worldly peace through meditation and prayer in the privacy of their individual cells. Under such a proscription, a judge who must make legal decisions in a jury case, such as the instant case, in which the judge neither calls nor questions the witnesses, would have no way to independently educate or inform him or herself on technical matters that arise during the trial. No court has ever held or even said it is morally or ethically or legally wrong for a judge to ask questions and explore ideas with family members and close acquaintances who have an expertise in technical issues relevant to litigation. No court has ever held a judge should be commended for failing to educate and inform him or herself and dwelling in ignorance. Judges know that their lives can be lonely, that their interaction with peers and colleagues is limited, but if this interpretation of Canon 3(B)7 will be enforced by the Judicial Qualifications Commission, judges will be severely alienated from the society they are sworn to serve. The independence of the judiciary declared in the Preamble to the Code of Judicial Conduct and in Canon 1 will be seriously impaired by such a restriction on judges' scope of self-education, informing themselves and involvement in society.

3. "Ex parte" comes from Latin. "Ex" means "out of" or "from." "Parte" is the singular form of "party." The term "ex parte" has always meant "from or on behalf of one party." That is how it is defined in Black's Law Dictionary and every other dictionary we could find. The Investigative Panel appears to have seized on the dicta of the Fifth District Court of Appeal in *U.B.S. v. Disney*, 768 So. 2d 7 (Fla. 5th DCA 2000), suggesting "ex

parte" in Canon 3(B)7 means contact with anybody, even if they are family members, close friends and confidantes of the judge. With all due respect to the commission and the district court, it would have substantial and difficult consequences to alter American jurisprudence and say "ex parte" now means Canon 3(B)7 prevents any and all personal conversation whatsoever about a pending case except with both attorneys or fellow judges or law clerks.

II. Judicial Error vs. Judicial Discipline

4. The formal charges clearly state that they are based entirely on the Fifth District Court of Appeal's opinion in *Universal Business Systems, Inc. v. Disney Vacation Club Management, Inc.* 768 So. 2d 7 (Fla. 5th DCA 2000), which reversed a ruling made by Judge Baker in a jury trial before him. It is well established in Florida, and every jurisdiction in the United States that has considered the question, that judicial error which can be corrected on appeal is not the basis for disciplinary proceedings against a judge, absent some additional misconduct above and beyond the error. In this case, as the formal charges themselves demonstrate, any error by Judge Baker not only could be but was addressed and corrected by the appellate court. This case involves no allegation of misconduct beyond the judicial error as seen by the district court and mentioned in its reversal. It is also beyond dispute that any error by Judge Baker in the case at issue was one of good faith, as evidenced by the fact that it was his written ruling that identified the conduct that is the basis of this charge; but for Judge Baker's written disclosure of his actions, there would be no record or knowledge thereof by the parties, the Fifth DCA or this Commission.

5. In *Universal Business Systems,* the jury trial over which Judge Baker presided, he reached his legal conclusion that the plaintiff's theory of damages was legally unsound after opening statements. He announced his tentative legal conclusion early in the trial, and continued to research the legal issues presented by the plaintiff's damages case, and did that research in court, and after court at night and on the weekends. At the same time he attempted to further educate himself on computer programming to better understand the evidence as the case was being presented to the jury. Judge Baker gave the parties a written draft of his research and conclusions during the trial. His education in computer programming did not change his legal conclusion in the case to set aside the jury verdict, but Judge Baker felt it made his decision better informed.

6. Before entering a final judgment, Judge Baker wrote a twelve-page Memorandum of Ruling to explain his decision. The Fifth DCA reversed, and included in its opinion the statement that Judge Baker:

> [I]mproperly considered information gleaned from ex-parte communications in reaching [his] decision to override the jury's verdict.

Universal Business Systems, 768 So. 2d at 8. This quoted language is the basis of the formal charges in this case.

7. "Ex parte" is defined in *Black's Law Dictionary* thus:

> On one side only; by or for one party; done for, in behalf of, or on the application of, one party only.

Every other dictionary of ordinary English usage is to the same effect, that "ex parte" means on behalf of or favoring one side or the other. The undersigned has researched "ex parte" as used in disciplinary proceedings and found 59 references throughout the country.

In every one of these, "ex parte" was used to refer to contacts or communications on one side only, on behalf of or in favor of one side only.[1] Citations of "ex parte" outside of disciplinary proceedings were the same usage. There is no precedent to establish, or even suggest, that these charges are just and proper; indeed, if these charges are ultimately successful, then Judge Baker will be the first judge in the United States to be so sanctioned, based upon our research.

8. It appears that the Fifth DCA's reference to and usage of the phrase "ex parte" was imprecise and perhaps inappropriate in this case, although the court noted expressly that it was *not* commenting "as to whether the trial court violated Canon 3(b)" of the Judicial ethics code. *Universal Business Systems,* 768 So. 2d at 8. [2] The formal charges against Judge Baker are that he "made inquiries of several computer consultants and experts concerning technical issues relating to the issue of damages." There is no contention Judge Baker questioned or contacted any parties, witnesses, attorneys or anyone else connected with the case or that he investigated the facts of the case --- thus, there is no evidence of any communications that could properly be viewed as "ex parte" communication, as stated by the Fifth District's opinion. *See Matter of Phalen*, 475 S.E.

---

[1] The very etymology of "ex parte" illuminates the meaning of this phrase and the thin thread by which the JCQ's charges hang in this case. The phrase "ex parte" is Latin for "from or out of or on behalf of one party only."

[2] This opinion, the apparent sole basis for the JQC's charges, has not been released as final by the Fifth DCA. The mandate has been stayed pending disposition of the notice to invoke discretionary jurisdiction by the Supreme Court and final disposition of the cause.

2d 327 (W. Va. 1996) (court defined "ex parte" as the "very act of talking to one party without

the other creates an ex parte situation"). Judge Baker was not the fact finder; the jury was. Judge Baker could not and did not make any findings of fact. There is no contention by anyone that Judge Baker contacted persons who favored one side or the other. Judge Baker's only contacts were to improve his understanding of computers and computer programming. [3] If Judge Baker was in error in doing so, that error was an honest and good faith mistake, and it has been addressed and corrected by the appellate court.[4]

9. If these formal charges are held to be legally sufficient, it must be on the principle that parties or counsel may continue to pursue a trial judge's errors by instituting judicial discipline procedures even after those errors are found and corrected by a an appellate court. Thus, the formal charges in this case in effect ask the Judicial Qualifications Commission to become an additional and alternate appellate court, which is, of course, contrary to the constitutional and statutory law of Florida creating the Judicial

---

[3] It is worth noting that Judge Baker's efforts to be informed and educated about the technical matters before him have resulted in favorable comment by the Florida Supreme Court. In *Dep't. of Agriculture v. Polk*, 568 So. 2d 35, (Fla. 1990), Justice MacDonald, in a concurring opinion, referred to Judge Baker's "fine analysis of the scientific aspects of the Florida citrus canker epidemic from a judicial perspective." In the case history referred to by Justice MacDonald, Judge Baker cited the persons with whom he had discussed the canker issue, including professors and plant experts.

[4] It should be noted that Judge Baker, while believing that his self-education activities are not a violation of the Judicial Canons, advised both the Investigative Panel at the November hearing and this Commission in his Motion for Rehearing that he would abide in the future by this Commission's interpretations of the Canon at issue, and that he would refrain from any communications of any kind that might be construed as violating the canons. That offer has received no response from this Commission.

Qualifications Commission, and also, we respectfully submit, beyond any fair notion of what this Commission is and should be.

10. Clearly, Judge Baker's self-education efforts cannot constitute "ex parte" communications in the manner that phrase is understood and used. But, there is another reason why these charges are legally insufficient: simple impractibility. Neither Judge Baker nor, we suspect, any other judge considers that a discussion with, for example, a spouse about a case before that judge is a violation of judicial ethics. But under the definition of "ex parte" presumably adopted by this Judicial Qualifications Commission, such communications would be actionable as disciplinary proceedings. We respectfully submit this is not what the Judicial Qualifications Commission intends.

III. Legal Argument on Judicial Error vs. Misconduct

11. Numerous appellate courts have addressed the issue of whether and under what circumstances judicial error is the basis for judicial disciplinary proceedings. These courts, in Florida and throughout the United States, uniformly hold judicial error is not a basis for judicial discipline with narrow exceptions, noted below, that do not apply in this instance.

12. It is hardly surprising that the courts have uniformly reached such a conclusion, for honest, good faith mistakes about what the law is (or will become) are not the stuff of which ethical and professional transgressions are made. The "exercise of poor judgment" or "judicial error" does not warrant discipline; something more than mistake is required to invoke and justify the powers of judicial disciplinary proceedings. *See, e.g.*, *In re Conard*, 944 S.W.2d 191 (Mo.1997); *In re Worthen*, 926 P.2d 853 (Utah1996); *In re Bell*,

894 S.W.2d 119 (Tex.Spec.Ct.Rev.1995); *In re Conduct of Schenck*, 870 P.2d 185, 318 Or. 402 (Or.1994); *Matter of Seaman*, 627 A.2d 106, 133 N.J. 67 (N.J. 1993) ; *In re Elliston*, 789 S.W.2d 469 (Mo.1990), *In re Voorhees*, 739 S.W.2d 178 (Mo.1987); *Complaint of Judicial Misconduct*, 8 Cl.Ct. 523 (Ct.1985); *Matter of Benoit*, 487 A.2d 1158 (Me.1985). Similarly, numerous courts have held that judicial error should be addressed on appeal, not by disciplinary proceedings. *See West Virginia Judicial Inquiry Commission v. Dostert*, 271 S.E.2d 427 (W.Va.1980); *Nicholson v. Judicial Retirement and Removal Commission*, 562 S.W.2d 306 (Ky.1978); *People ex rel. Harrod v. Illinois Courts Commission*, 372 N.E.2d 53 (Ill.1977); *Matter of Richter*, 409 N.Y.S.2d 1013 (N.Y.Ct.Jud.1977); *In re Nowell*, 237 S.E.2d 246, 293 N.C. 235 (N.C.1977), *In re Stuhl*, 233 S.E.2d 562 (N.C.1977), *Matter of Edens*, 226 S.E.2d 5 (N.C.1976).

13. Numerous reviewing courts have recognized that allowing disciplinary proceedings to act as additional or alternate appellate courts would be inconsistent with what disciplinary proceedings should be. *See, e.g., In re Troy*, 306 N.E.2d 203 (Mass.1973) (the "Supreme Judicial Court cannot permit or encourage use of disciplinary power of the court as initial remedy for alleged error in judgment or abuse of discretion by a judge. Attempts to correct judicial action in these areas must be left to established methods of appeal"); *See also, Murtagh v. Maglio*, 195 N.Y.S.2d 900, 9 A.D.2d 515 (N.Y.1960); *Perez v. Meraux*, 9 So.2d 662 (La.1942); *In re Capshaw*, 17 N.Y.S.2d 172, 258 A.D. 470 (N.Y.1940); and *Staples v. Sprague*, 31 Ohio Law Rep. 120 (Ohio App.1929).

14. The Florida Supreme Court has also recognized that judicial error is not the basis for judicial disciplinary proceedings, and that something more is required. In *Inquiry*

concerning Perry, 641 So. 2d. 366 (Fla. 1994), the Florida Supreme Court reprimanded Judge Perry for abusing the contempt powers of a judge by setting up numerous defendants in traffic cases to violate driving restrictions with cooperation of police, not following prescribed procedure for indirect contempt, imposing excessive bail resulting in lengthy incarcerations prior to hearings, coercing pleas and imposing jail time in relatively minor traffic cases. The Supreme Court held this was not merely judicial error but was a purposeful and planned misuse and abuse of contempt powers.

15. Other courts have followed this doctrine. For example, in *Matter of King*, 568 N.E.2d 588 (Mass.1991), as in *Perry*, the court held that error could rise to the level of judicial misconduct only because the judge utterly disregarded law and procedure and established personal rules of court in face of contrary orders. Similarly, in *In re Kelly*, 407 N.W.2d 182 (Neb.1987), the court held that disciplinary misconduct requires a finding that the "misconduct is 'willful,' [shows] bad faith," and that the "willfulness involves more than error of judgment." *In re Kelly* went on to say that "a certain amount of honest error is expected of judges and does not necessarily warrant discipline." Error could rise to the level of misconduct for discipline only where it is "blatant, fragrant [or involves] repeated errors or failures in performance of judicial duties." *Id*.

IV. The Code of Judicial Conduct and Rights of Lawyers

16. Sustaining the formal charges as stated in this proceeding could have a significant and damaging effect on bench and bar . Fundamental to the formal charges in this case is the premise that Canon 3(B)7 of the Code of Judicial Conduct gives lawyers a right of action upon which relief may be granted against any judge of any court in the

state. Attached to this motion as Exhibit "A" is the statement of this position given by trial lawyer Michael Nachwalter at the investigatory hearing of Judge Baker. It is not attached as evidence or to make this a "speaking motion" but as a full statement of the legal interpretation of Canon 3(B)7 by that panel.[5]

17. According to this interpretation, Canon 3(B)7 gives attorneys in any case a right to sanctions against any judge who educates himself on a technical subject involved in a pending or impending case without supervision and control of the lawyers in the case, which is precisely what is alleged against Judge Baker. This is contrary to the Preamble and purpose of the Code of Judicial Conduct which provides:

> The Canons and Sections are rules of reason.
>
> ****
>
> The Code is not to be construed to impinge on the essential independence of judges in making judicial decisions.

The Investigatory Panel's construction severely impinges on the essential independence of judges by giving trial lawyers a leash on judges and control over the education and self-education of judges.

18. It is also clear that the Code of Judicial Conduct does not gives lawyers rights over judges. Canon 1 says:

> An independent and honorable judiciary is indispensable to justice in our society.

What kind of independence could a judge have if he or she is not permitted to educate themselves without oversight and participation by lawyers? What could be more honorable

---

[5] A British judge, Lord Chief Justice Parker was once quoted as sarcastically saying, " A judge is not supposed to know anything about the facts of life until they have been presented in evidence and explained to him at least three times."

for a judge than to educate him or herself in order to make a more and better informed judgment?

V. Legal Argument on Canon 3(B)7 and Rights of Lawyers

19. Judge Baker has previously heard the trial lawyers' argument that they are entitled to control a judge's education on technical matters that come up in a jury trial. Judge Baker first researched this trial lawyers' argument fifteen years ago and has thoroughly researched it several times since. Judge Baker has read every case cited in all of the state and Federal courts of the United States focusing on Florida's Canon 3(B)7 which is drawn from the model code of the American Bar Association. It is in force in most other states and the Federal courts. Neither Judge Baker nor we can find any precedent for the construction of Canon 3(B)7 adopted by the Investigative Panel in filing formal charges. That Panel and their counsel have cited no authority for their construction of Canon 3(B)7. From his and our research, we believe Judge Baker will be the first judge in American history against whom sanctions are sought for educating himself.

20. Judge Baker knows and has fully abided by the prohibition from investigating the facts or having any contact with attorneys, parties, witnesses, and he has not done so in *U.B.S. v. Disney* and other cases. He did not have ex parte contact with anyone, since "ex parte" means "on behalf of or favoring one party."

21. Besides proscribing ex parte communications, Canon 3(B)7 also contains the clause,

> or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding....

Judge Baker had researched every case in the country using this "other communications" clause prior to *U.B.S. v. Disney* and after being notified of being investigated. All of the case precedents and commentary construing this clause uniformly deal with communications from persons outside the litigation that are intended to influence the judge's decision in favor of a party. An example of this is *In re: Marriage of Wheatley*, 697 N.E.2d 938 (Ill. App. 5th 1998), which held a letter to the judge from a former Congressman regarding a custody award required vacating the custody order. Similarly, in *State v. Kirsch*, 2000 WL 1530031 (Conn. 2000), the issue was whether a letter to the trial judge from a member of the public regarding the sentencing of a criminal defendant was "other communication." The letter was read into the record, and the court found it was not grounds to disqualify the judge. In *McKenzie v. State*, 583 N.W.2d 744 (Minn. 1998), a judge's participation in a judges meeting was challenged as a violation of Canon 3(B)7 on the basis that at the meeting, relevant issues came up for discussion. The appellate court found that the trial judge's participation in this meeting was not a violation.

22. There is absolutely no authority that this "other communications" clause applies to a judge educating him or herself on technical subjects (or educating oneself on any other subjects) relevant to pending or impending cases. The above cases are the closest thing to authority on the subject of "other communications" and those cases do not involve judicial disciplinary proceedings, nor were reversible errors found.

23. If this formal charge is recognized as a valid one for this case, it will have a chilling effect on judges in the state who will fear doing any independent research on technical subjects in pending and impending cases. This can only serve to encourage ignorance among judges. Continuing judicial education will be compromised if this novel

and radical construction of Canon 3(B)7 is recognized as valid by the Hearing Panel. The only judicial education that could be permitted is education that is irrelevant to pending or impending cases.

According to the *Judicial Conduct Reporter*, Spring 1993, in an ABA Model Code Adoption Update, the State of Indiana has recognized this problem of such an interpretation. It revised its counterpart to Canon 3(B)7 as to "other communications" by adding this language:

> Nothing herein is intended to prohibit a judge from consulting with the Indiana Judicial Center or from participating in continuing legal education.

24. Judge Baker has discussed the limitation of Canon 3(B)7 with appellate and trial judges and law clerks and lawyers. He has previously heard the position expressed by the trial lawyer at hearing held November 10, 2000, and has asked for authority to support it. No legal authority and no commentary has ever been cited to him to support that position. It is simply unjust and unfair to charge Judge Baker with a conduct violation where he and others have carefully and fully researched the matter and nothing in legal literature suggests any violation.

25. The undersigned law firm as well as Judge Baker has researched Canon 3(B)7 and every source we could find on judges' "ex parte communications," "other communications" and "education," and we find the position expressed at the November 10 hearing to be completely unprecedented. For the Judicial Qualifications Commission to file charges saying a judge's qualification for office requires submitting to the dominion of attorneys on what judges can learn and how they may educate themselves will put fear and uncertainty in judges throughout this and other states.

26. In an article in the *Judicial Conduct Reporter*, Spring 1989, on the Illinois Code which adopted Canon 3(B)7, it was observed by Jennifer A. Winter that it could be construed so broadly as to cover any contact with anyone outside court personnel or in the presence of counsel. The author observed that such an interpretation would make it impossible for a judge to comply. The court system, itself, would lead to violation of the rule, as where a judge has two or more cases involving a similar technical matter. If the judge is educated in one case by its lawyers, the judge will be tainted in all further cases involving the same matter. This is very common, especially in criminal cases, with the same forensic experts repeatedly testifying on scientific and technological subjects.

27. The construction of Canon 3(B)7 given by the Investigative Panel in its finding of probable cause would put virtually every judge in repeated violation of the Canon. This is especially true in criminal and juvenile jurisdiction where the judge is in frequent contact with the same attorneys, expert witnesses, probation officers, law enforcement, and rehabilitation providers who regularly mention matters bearing on pending and impending cases.

28. Jennifer Winter also published a review of a publication by Hon. Charles F. Scott, in *Judicial Conduct Reporter*, Winter 1989. In her own article and in the review of Judge Scott's article it is concluded that Canon 3(B)7 as to "other communications" creates "nebulous guidelines [that] make it difficult for a judge to determine what conduct is permissible." Ms. Winter concludes by recommending the "Supreme Court of Illinois should clarify the ambiguities of the new ex parte [and other] communications rule." Also, she proposes that "we ask ourselves to what length we are prepared to go to insure that our judges neither make nor receive ex parte [and other] communications" and then "we can

formulate a better rule." To broadly interpret the proscription of Canon 3(B)7 would make the judiciary like a cloistered religious order.

29. With regard to the Fifth DCA's opinion, Judge Baker was never advised by anyone they alleged he had improperly considered certain information, even though the parties could have done so during the trial and even after the Memorandum of Ruling was filed. Judge Baker did not have any idea it was raised on appeal by appellant. It was not addressed by appellee, according to what Disney's counsel told the undersigned attorney. Judge Baker had no notice of any hearing or discussion of his contacts being alleged as improper. Judge Baker was not heard on this by the appellate court. That court did not have any evidence on the nature of Judge Baker's contacts, the books and Internet connections he read and who he talked to about how computers and computer programs work. Judge Baker was not a party to the case or the appeal. The Fifth DCA expressly did not decide whether Canon 3(B)7 was violated, nor could it properly make such a finding, as it has neither personal nor subject matter jurisdiction to do so.

30. We respectfully suggest that a prosecution by the Judicial Qualifications Commission of Judge Baker would be an unprecedented accusation that education and self education is a violation of Canon 3(B)7. We suggest Canon 3(B)7 should be clarified by the Florida bar and bench and especially the Supreme Court of Florida before charging a violation for good faith self-education on a complex technical issue.

31. Lawyers may suspect and judges may fear that any education a judge undertakes could bear on pending or impending cases. That raises Constitutional implications for a Code that prevents the class of judges from exercising such a fundamental right as education without permission and oversight of lawyers.

VI. Conclusion

For the foregoing reasons, we respectfully request that the formal charges be dismissed.

Certificate of Service

I HEREBY CERTIFY that the a copy of the foregoing has been furnished by U.S. Mail delivery to *Thomas C. MacDonald, Jr., Esquire*, General Counsel to the Florida Judicial Qualifications Commission, 100 N. Tampa Street, Suite 2100, Tampa, FL 33602; *Brooke S. Kennerly*, Executive Director, Florida Judicial Qualifications Commission, 400 S. Monroe, Old Capitol, Room 102, Tallahassee, FL 32399; *John R. Baranek, Esquire*, Counsel to the Hearing Panel, P. O. Box 391, Tallahassee, FL 32302-0391; and *Charles P. Pillans III, Esquire,* Special Counsel to the Florida Judicial Qualifications Commission, The Bedell Building, 101 East Adams Street, Jacksonville, FL 32202, this 22nd day of December, 2000.

_____

David B. King
Florida Bar No. 0093426
Mayanne Downs
Florida Bar No. 754900
KING, BLACKWELL & DOWNS, P.A.
25 East Pine Street
Post Office Box 1631
Orlando, Florida 32802-1631
Facsimile: (407) 648-0161
Telephone: (407) 422-2472

Attorneys for Joseph P. Baker